such a position were it not for some previous decisions. In *Paul* v. *Virginia* (1868) 8 Wall. 168, and *New York Life Ins. Co.* v. *Cravens* (1900) 178 U. S. 389, it has been held that insurance business carried on between citizens of several States is not interstate commerce. These and similar decisions seem to the four dissenting justices insurmountable obstacles, as a lottery ticket is nothing more than a claim, contingent in character, against the lottery company. But the majority opinion pays no attention to them, and they are distinguishable, it may be, on the ground that they involved no actual carriage of tangible articles from one State to another. The carriage of things for hire might well be considered commerce, like the carriage of persons, irrespective of the purpose for which the things themselves are used.

That the power given to Congress in the Constitution to regulate interstate commerce was meant to include the power to forbid it, is probably a fair proposition for debate. Neither the majority nor the minority opinion however puts forth any satisfactory reasoning for the interpretation which it urges HARLAN, J., for the majority, begs the question in triumphantly quoting from MARSHALL that the power "acknowledges no limitations other than are prescribed in the Constitution," and then calling upon the other side to point out some limiting clause. But the point has been practically settled by the acquiescence of the nation in the Embargo Acts of a century ago. FULLER, C. J., gives no authority for his attempted distinction between the powers of Congress over interstate and over foreign commerce. The result of the decision is that the word "regulate" in this clause is practically equivalent to "control."

The widespread interest the case has aroused is due in great measure to the possibilities it suggests. The Court carefully limits its decision to carriage by independent carriers, and to the carriage of lottery tickets. Perhaps the taking of lottery tickets from one State to another by a person for his own use would be beyond the control of Congress, on the ground that under the distinction already suggested it would not be interstate commerce. But the ground of the limitation to lottery tickets which most of the States have decided to be dangerous to public morals, is not apparent. The powers of Congress must be totally independent of the policy of the States, and of any changes therein. Nor can the power to prohibit be limited to what is against public health and morals; to repeat the quotation from MARSHALL, "the power to regulate acknowledges no limitations other than are prescribed in the Constitution." Those limitations are found in the ninth section of Article I and in the first ten amendments; but the only one bearing on this matter is the guaranty of due process of law in the taking of life, liberty and property. Amend. V. The prohibition of combinations in restraint of trade is not an unlawful deprivation of liberty, *U. S.* v. *Joint Traffic Ass'n* (1898) 171 U. S. 505; and neither, it would accordingly appear, would be the prohibition of interstate transportation of goods manufactured by such a combination.

PRIORITIES IN PARTIAL ASSIGNMENTS OF MORTGAGE DEBT.—The rule that in equity the mortgage follows the debt, so that an assignee of

the debt becomes thereby equitably entitled to the benefit of the mortgage security, applies to partial, as well as to absolute assignments. Ordinarily, therefore, each assignee acquires an interest in the mortgage equal to his share of the debt. When, however, the security is insufficient it becomes important to determine whether any priority arises in favor of the assignee of one part against the assignee of the other parts or against the assignor. A recent Indiana case, *Alden* v. *White* (Ind. 1903) 66 N. E. 509, reaches the conclusion that as between assignor and assignee the latter has a priority. After judgment had been taken on the mortgage debt and a decree of foreclosure entered, twelve-fifteenths of the judgment were assigned, and it was held that such parts were entitled to a preference over the three-fifteenths that had always remained in the hands of the mortgagee.

The question usually arises in a more complicated form, as where several notes, maturing at different dates, are given in payment of a debt and a single mortgage made to secure the whole. The courts differ irreconcilably in their views; some holding that the assignment of any note carries with it a right merely to a proportionate interest in the mortgage and hence all parties must share *pro rata* without any priority; others holding that an assignment operates as a transfer of the mortgage *pro tanto* and hence gives a priority sufficient to secure fully the note assigned. And it is disputed among the supporters of the latter view whether the fact of the assignment as against the assignor, or the date of the assignment as between assignees, or the date of maturity of the note should determine the priority.

This divergence of opinion appears in the leading case on the subject, *Donley* v. *Hays* (Pa. 1828) 17 Serg. & R. 400. The majority of the court, assuming the maxim "equality is equity" to be applicable, decreed that the various holders of bonds secured by a mortgage including the mortgagee should all share *pro rata* in the proceeds of the foreclosure sale; but GIBSON, C. J., in an able dissenting opinion supported the theory of priority according to the date of assignment. His view has been approved and followed in a few states. *Cullum* v. *Erwin* (1842) 4 Ala. 452; *Gordon* v. *Fitzhugh* (Va. 1876) 27 Gratt. 835; but the weight of authority is in accordance with *Donley* v. *Hays*. Jones on Mortgages §§ 1699–1703; *Keyes* v. *Wood* (1849) 21 Vt. 331; *Wilson* v. *Eigenbrodt* (1882) 30 Minn. 4; *Penzel* v. *Brookmire* (1888) 51 Ark. 105.

It is undoubtedly competent for the parties to the assignment to create, regulate, or prevent a priority by means of an express agreement, or one to be implied in fact from the circumstances of the transaction. *Granger* v. *Crouch* (1881) 86 N. Y. 494. When, however, as in many cases, nothing appears beyond the mere fact of the assignment, it is necessary to adopt some general rule of construction, which shall give to it the fairest and most equitable interpretation. Approaching the question from this point of view the Virginia and Alabama courts argue that it is natural to suppose that a secured claim, or any portion thereof, is assigned at its face value, and so if a deficiency results, the assignee, who has relied on the collectibility of the demand, should be entitled to prior satisfaction out of the security. The assignor is not bound to make good to him the loss

if the security be inadequate, but he should not at least cause him loss by interposing his own competing claim. Further it is suggested that this principle is merely the converse of that by which the vendor of part of an incumbered estate is held not entitled to contribution from the vendee in paying off the incumbrance, *Clowes* v. *Dickinson* (1821) 5 Johns. Ch. 235, and from which is derived the rule that where a part of mortgaged premises has been alienated a decree of foreclosure must direct the part still held by the mortgagor to be sold first. It would follow from this reasoning that a subsequent assignee of another installment of the debt, though he gets an equal equity, is barred by the priority in time of the claim of the first assignee.

Some states, however, adopt the rule, that the priority of any note is determined by the date of its maturity. Pomeroy's Equity Jurisprudence §§ 1201–1203; *Isett* v. *Lucas* (1864) 17 Iowa 503; *Aultman-Taylor Co.* v. *McGeorge* (1884) 31 Kan. 329. These cases apply this rule even as between assignor and assignee; but Indiana, following Pomeroy's opinion, has very inconsistently confined it to the determination of priorities between assignees, who as *Alden* v. *White* declares, are always preferred to the assignor. *Parkhurst* v. *Watertown Steam Engine Co.* (1886) 107 Ind. 594. This theory in any form seems objectionable because it rests on an unwarranted separation of the single mortgage into several to correspond with each successive note, and because, in assuming that the right of the holder of the earliest maturing note to enforce it by foreclosure gives him a preference, it violates the principle that it is the time of the creation of liens, not that of their enforcement, which regulates the mutual rights of the holders.

The position of the opposing decisions, that all parties stand *in æquali jure*, is defended on the ground that as no portion of the debt is entitled to preference while all is held by the mortgagee, he cannot be presumed to give another a better right than he himself possesses. It is also said to be supported by the doctrine that in the application of the proceeds of the sale of a security for several debts, all must be paid *pro rata*, whether otherwise secured or not. *Orleans Co. Nat. Bank* v. *Moore* (1889) 112 N. Y. 543. But these rules are made for the protection of the mortgagor and the sureties for his debts and, whatever the equities they may create, they hardly apply to the present class of cases, where the mortgagor is an entirely indifferent party. If the debts secured by the mortgage were separate and distinct transactions, there would be reason for holding that the mortgage should under all circumstances be divided proportionally between them; but where it stands as security for what is really one obligation, it should not be material whether the latter is single or in the form of a series of notes or bonds. If this *pro rata* rule is to be preferred it is because it is based on an equally fair interpretation of what was contemplated by the parties; its application is not affected by the equities of the mortgagor and his sureties; and it avoids obvious hardship to subsequent assignees.

Attempt to Enjoin Subway Construction in New York City.— The New York Supreme Court has, for the second time refused to enjoin the construction of the New York City Subway through Park Avenue. *Barney* v. *City of New York* (1903) 39 Misc. 719. A pre-